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October 21, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 5, 2005

Case Number: TSO-0178

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization. For the reasons detailed below, it is my decision that the Individual's access authorization should be restored.

I. APPLICABLE REGULATIONS

The regulations governing an individual's eligibility for access authorization (also referred to as a security clearance) are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) ("the 'clearly consistent with the interests of national security' test indicates that 'security-clearance determinations should err, if they must, on the side of denials'"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site

based on the existing information or appearing before a hearing officer. *Id.* § 710.21(3). The burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, *i.e.*, that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

II. BACKGROUND

In 1980, the Individual applied for a job at a DOE facility, which required access authorization. At that time, the Individual reported prior illegal drug use. The Individual signed a "drug certification" in which he promised not to use illegal drugs while employed at the DOE facility, and the Individual was hired and granted access authorization.

In 1990, the Individual completed a security questionnaire in connection with a routine reinvestigation. DOE Ex. 13 (Questionnaire for National Security Position or QNSP). The Individual affirmed that he had not used illegal drugs in the past five years. During a 1992 personnel security interview, the Individual reported that he had used marijuana three or four times between 1980 and 1990, while visiting an out-of-state relative. As a result, the DOE notified the Individual that his violation of the drug certification and failure to report the drug use on the security questionnaire raised security concerns under 10 C.F.R. §§ 708.7(f) (Criterion F) & 708.7(l) (Criterion L), and the DOE suspended the clearance. The Individual's employer withdrew the request for access authorization, and the administrative review proceeding was terminated. DOE Ex. 9. The Individual remained employed at the DOE facility but did not have access authorization.

In 2003, the Individual's employer again requested that he be granted access authorization. In 2004, DOE security conducted a personnel security interview (the PSI), see DOE Ex. 15, and notified the Individual of the same security concerns expressed in 1992. DOE Ex. 1. The Individual requested a hearing. DOE security forwarded the request to the Office of Hearings and Appeals (OHA). The OHA Director appointed me to serve as the hearing officer.

The Individual did not dispute the matters giving rise to the security concern, *i.e.*, that he failed to report marijuana use on the 1990 security questionnaire and that the use violated his 1980 drug certification. Instead, the Individual sought to present documents and witnesses to resolve the security concern.

The Individual submitted extensive documentary evidence. The evidence consists of certificates, awards, letters of appreciation, and performance appraisals over the period 1990 to 2004. The evidence indicates that the Individual is viewed as a critical member of the engineering department with exemplary performance.

III. THE HEARING

Eight witnesses testified at the hearing. They were the Individual, the Individual's wife, the Individual's supervisor, three co-workers, a friend, and a psychologist.

A. The Individual

The Individual testified about his marijuana use and his failure to disclose the use on his 1990 security questionnaire. Transcript (hereinafter "Tr.") at 157-203. He expressed remorse, and he testified that he has matured over the intervening 15 years and is consistently honest, reliable, and trustworthy. Tr. at 162, 182, 198.

B. The Individual's Wife

The Individual's wife testified about the Individual. Tr. at 6-39. She stated that they met in 1992. Tr. 6.

The Individual's wife testified that the Individual does not use illegal drugs; she stated that she would not be married to him if he were involved with them. Tr. at 12, 18. She stated that she understood that the Individual's marijuana use occurred on rare visits to a certain out-of-state relative. Tr. at 28. She stated that the Individual had not used illegal drugs on subsequent trips to those relatives.

The Individual's wife also testified that he is honest, reliable, and trustworthy. She stated that the Individual is "honest to a fault." Tr. at 19. She related several incidents where the Individual returned money or corrected mistakes in his favor. She characterized the Individual as a "good," "kind-hearted," "giving," and "patient." Tr. at 14.

C. The Individual's friend

The Individual's friend also works at the DOE facility. Tr. at 122-40. The friend testified that he has known the Individual

for approximately 12 years and spends a significant amount of time with him. Tr. at 122-23. The friend described the Individual as "very forthright." Tr. at 125.

The friend testified that he has never known the Individual to use illegal drugs and that they would not be friends if drugs were a part of the Individual's lifestyle. Tr. at 127-28, 132. The friend stated that the Individual expressed remorse about his decision to use marijuana and his failure to disclose that use on his security questionnaire. Tr. at 128, 131. The friend stated that he believed that the Individual would not repeat those mistakes or otherwise fail to disclose derogatory information on a security questionnaire. Tr. at 139.

D. Co-worker No. 1

Co-worker No. 1, who is also a friend, testified that he has known the Individual for 20 years and worked closely with him for at least fifteen years. Tr. at 40-41. The co-worker testified that Individual recognizes that his use of marijuana was "poor judgment" and his failure to disclose it a "grievous error." Tr. at 52. The co-worker testified that the Individual was reliable and trusted with important jobs. The co-worker described the Individual as a "good worker, self-starter, self-motivator [and] always thinking ahead." Tr. at 41. Finally, the co-worker stated that the Individual has exhibited trustworthiness and honesty in his dealing with sensitive proprietary information. Tr. at 48-49.

E. Co-worker No. 2

Co-worker No. 2 testified that she has worked with the Individual for eight or nine years. Tr. at 61. She described the Individual as "a hard worker," and she knows that she "can trust" him. Tr. at 62-63. She stated that the Individual has been open and honest about the reasons for the revocation of his clearance and that he has worked hard to reestablish the DOE's trust. Tr. at 80-82.

F. Co-worker No. 3

Co-worker No. 3 has known the Individual for approximately 19 years. Tr. at 84. Co-worker No. 3 testified that he was surprised and taken aback when the Individual told him that he lost his security clearance because of marijuana use. Tr. at 87. The co-worker further testified that he believes the Individual to be honest, because he has never caught him in a lie. Tr. at

89. The co-worker stated that the Individual expressed remorse about his marijuana use and referred to it as a "stupid thing to do." Tr. at 91.

G. The Individual's supervisor

The Individual's supervisor of over two years testified that the Individual "is a great employee. He's a self-starter. He's very motivated. He's a deep resource for the equipment that we run. People come to him with problems that they have; he solves them." Tr. at 142. The supervisor testified that the Individual "has always been honest and straightforward with me. I've never seen any reason to question that." Tr. at 143-144. He also testified that he has never known the Individual to use drugs. Tr. at 146. Finally he testified that "in addition to all the work that he's doing with me, I see this man as somebody who is moving his life forward, he knows which direction he wants to go, and I think he's learned from his past experiences and mistakes, and he doesn't want to repeat them." Tr. at 150.

H. The Psychologist

The psychologist testified about her hour-long evaluation of the Individual. Tr. at 102-21. She testified that the Individual did not show any indications of a substance abuse problem. Tr. at 109. She stated that the Individual expressed regret about his marijuana use. She testified that her impression was that "the behavior was part of a family gathering" and that there was a "99 percent likelihood" that it would not recur. Tr. at 114-115.

IV. APPLICABLE STANDARD

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). In that case, the individual has the burden to prove that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(a).

Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. In considering derogatory information, the DOE considers various factors including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of

reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. *Id.* § 710.7(c). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. *Id.* § 710.7(a).

V. ANALYSIS

The derogatory information concerns marijuana use that violated the drug certification and was not disclosed on the Individual's security questionnaire. Those matters raise security concerns under Criterion F, which concerns honesty in personnel security matters, and Criterion L, which concerns honesty, trustworthiness and reliability. Since the derogatory information giving rise to the security concerns is so closely intertwined, I will address those security concerns together.

The Individual does not challenge the facts recited in the Notification Letter. The Individual also does not challenge the allegation that the facts raise a legitimate security concern. Instead, the Individual expresses remorse and states that he can now be trusted with a clearance. Thus, the only issue to be resolved is whether that is the case.

Violation of the drug certification and failure to disclose it on a security questionnaire casts doubt on whether the DOE can trust an individual. This is a difficult concern to resolve, but I have concluded that the evidence and testimony presented by the Individual resolves the concern in this case.

The evidence and testimony strongly supports the Individual's position that he is now honest, reliable, and trustworthy. The Individual has worked at the DOE facility for 25 years and is a respected and valued employee. The events giving rise to the security concern occurred 15 years ago. The Individual disclosed them to DOE in 1992, thereby beginning a period in which he could attempt to regain the DOE's trust. Over the next 13 years, the Individual continued to work at the DOE facility, albeit without a clearance. The Individual's witnesses - who know the Individual well - testified that he has expressed remorse and conducted himself in an exemplary manner. I believe that the witnesses appreciated the gravity of the security concern and that they testified honestly and candidly. Their testimony is consistent with the documentary evidence, which shows the Individual to be a trusted and valued employee. Based on the foregoing, I find that the Individual has resolved the security concern. See, e.g., Personnel Security Hearing, Case

No. VSO-0319, 27 DOE ¶ 82,851 (2000) (rehabilitation found where i) nine years had passed since the voluntary correction of falsification and ii) the individual demonstrated a reputation for honesty, reliability and trustworthiness).

VI. CONCLUSION

The Individual has resolved the Criteria F and L concerns set forth in the Notification Letter. Therefore, I conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I have concluded that the request for access authorization should be granted.

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date: October 21, 2005